

**Questions for the Honorable Radhika Fox,  
Assistant Administrator,  
U.S. Environmental Protection Agency, Office of Water:**

**Subcommittee on Water Resources and Environment Hearing  
July 14, 2021**

Questions from Ranking Member David Rouzer (NC):

1. Your written testimony discusses developing “durable” policy on *Clean Water Act* section 401 certification. Isn’t it true that some states have interpreted the language in section 401 as allowing them to use that certification authority to impose requirements that go way beyond water quality-related requirements, thereby essentially turning the 401 Certification process into another broad environmental review process like under *National Environmental Policy Act* (NEPA)? If the language of section 401 is not limited to *water quality* concerns under the *Clean Water Act* or state law, how does the Environmental Protection Agency (EPA) interpret the scope?

**RESPONSE:** EPA believes that Congress provided authority to states and Tribes under Clean Water Act section 401 to protect the quality of their waters from adverse impacts resulting from federally licensed or permitted projects. EPA recently announced its intent to revise the 2020 Clean Water Act Section 401 Certification Rule after expressing substantial concern that the rule erodes state and Tribal authority. Through this process, EPA will consider strengthening the authority of states and Tribes to protect their vital water resources.

EPA is concerned that the 2020 rule’s narrow scope of certification and conditions may prevent state and tribal authorities from adequately protecting their water quality. Recently, as part of EPA’s initial process of reconsidering and revising the 2020 Section 401 Certification Rule, EPA provided an opportunity for public and stakeholder input to inform the development of a proposed regulation. EPA plans to continue to engage in a sustained dialogue with state and Tribal co-regulator partners and local governments around these issues.

2. After the publication of the 2015 Obama-era rule, 31 states and myriad stakeholder groups, such as those representing farmers, ranchers, construction, miners, and really anyone that wants to build anything, opposed the Waters of the United States” (WOTUS) rule.<sup>1</sup> Please list the organizations that have complained, or are otherwise opposed to, about the Trump Administration’s “Waters of the United States” (WOTUS) rule.

**RESPONSE:** Many states, tribes, and stakeholder groups have expressed their concerns about the Navigable Waters Protection Rule (NWPR) in public documents and litigation.

---

<sup>1</sup> The Navigable Waters Protection Rule: Definition of “Waters of the United States”, 85 Fed. Reg. 22250, (Apr. 21, 2020), at 33.

The Environmental Protection Agency and U.S. Army Corps of Engineers (the agencies) are in receipt of the U.S. District Court for the District of Arizona's August 30, 2021 order vacating and remanding the NWPR in the case of *Pascua Yaqui Tribe v. U.S. Environmental Protection Agency*. In light of this order, the agencies have halted implementation of the NWPR and are interpreting "waters of the United States" consistent with the pre-2015 regulatory regime until further notice. The agencies continue to review the order and consider next steps. This includes working expeditiously to move forward with the rulemakings [announced on June 9, 2021](#), in order to better protect our nation's vital water resources that support public health, environmental protection, agricultural activity, and economic growth. The agencies remain committed to crafting a durable definition of "waters of the United States" that is informed by diverse perspectives and based on an inclusive foundation.

The agencies are committed to hearing from voices across the spectrum when developing a durable regulatory definition on which co-regulators, stakeholders, and communities can rely. As a first step, on July 30, 2021, EPA and the Army announced a series of engagement opportunities, including an opportunity for stakeholders and the public to provide written recommendations and participate in a series of public meetings. In addition, the agencies initiated Federalism and Tribal consultations and announced that the agencies intend to host a series of dialogues with state and Tribal co-regulators this fall.

The agencies also plan to convene regionally focused and inclusive roundtables. These roundtables will allow a full spectrum of the agencies' partners to engage and discuss their experience with definitions of "waters of the United States"—including what has worked and what has not. The roundtables will provide opportunities to discuss geographic similarities and differences, particular water resources that are characteristic of or unique to each region, and site-specific feedback about implementation. The agencies are interested in hearing from all stakeholders, including communities, states, Tribes, local governments, association groups, small businesses, farmers, and families.

3. *Clean Water Act* Section 101(b) states that "[i]t is the policy of the Congress to recognize, preserve, and protect the primary responsibilities and rights of States to prevent, reduce, and eliminate pollution, to plan the development and use (including restoration, preservation, and enhancement) of land and water resources, and to consult with the Administrator in the exercise of his authority under this chapter." This shows it was the intent of Congress to recognize the primacy of states in protecting their own waters over that of the federal government. Do you agree? Are states not in a unique position that enables them to best know where resources are best used for environmental protection? If not, please explain why you think that the federal government is better suited to determine State water plans.

**RESPONSE:** I agree with you that states play a critical role in Clean Water Act implementation, and the agencies look forward to hearing specifically from our state and tribal co-regulators to help inform next steps. A durable definition of "waters of the United States" is essential to ensuring clean and safe water in all communities—supporting human health, animal habitat, agriculture, watersheds, flood management, local economies, and industry. The agencies' July 30, 2021

announcement, which kicked off consultations with states, Tribes, and local governments, as well as a robust public engagement effort on this issue, marks an important step in the agencies' efforts to restore protections and write a rule to define "waters of the United States" that is grounded in science and the law, emphasizes implementation, and prioritizes collaborative partnerships with states, Tribes, local governments, and stakeholders.

4. Last month, both EPA and the Army Corps of Engineers (the "Agencies") announced they would redo the Navigable Waters Protection Rule (NWPR) and re-write the definition of the "Waters of the United States." There are many concerns that the Obama Administration's rule failed to genuinely consider stakeholder feedback and placed burdensome and confusing requirements on farmers, small businesses, local communities, and regulated entities.
  - a. How does the Biden Administration plan to solicit and incorporate substantive feedback from those affected by this regulation?
  - b. What specific steps do you intend to take to engage the states in substantive consultation to ensure their concerns are fully addressed in a final rule?
  - c. Will the Agencies issue an Advance Notice of Proposed Rulemaking (ANPRM) to solicit input from impacted stakeholders?
  - d. When does the Administration plan to issue an NPRM?

**RESPONSE:** As a first step to developing a durable regulatory definition on which stakeholders and communities can rely, on July 30, 2021, EPA and the Army announced a series of engagement opportunities, including an opportunity for stakeholders and the public to provide written recommendations via an open docket and participate in a series of public meetings. In addition, the agencies initiated Federalism and Tribal consultations and announced that the agencies intend to host a series of dialogues with state and Tribal co-regulators this fall. The agencies also plan to convene regionally focused and inclusive roundtables. These roundtables will allow a full spectrum of the agencies' partners to engage and discuss their experience with definitions of "waters of the United States"—including what has worked and what has not. The roundtables will provide opportunities to discuss geographic similarities and differences, particular water resources that are characteristic of or unique to each region, and site-specific feedback about implementation.

Additional information on the agencies' public engagement efforts can be found at <https://www.epa.gov/wotus/notice-public-meetings-regarding-waters-united-states>.

5. You recently stated the Agencies will "[v]ery imminently" announce a two-step rulemaking process for repealing and then replacing the Navigable Waters Protection Rule (NWPR).<sup>2</sup> At what point "this summer"<sup>3</sup> do you anticipate the Agencies will issue a proposal to repeal the NWPR? Do the Agencies plan to conduct stakeholder outreach and engagement in advance of issuing such a proposal?

---

<sup>2</sup> Hannah Northey, *EPA's top water official on Biden climate, equity, goals*, POLITICO, July 6, 2021, available at <https://subscriber.politicopro.com/article/eenews/2021/07/06/epas-top-water-official-on-bidens-climate-equity-goals-179726>.

<sup>3</sup> *Id.*

**RESPONSE:** See above response to your Question 4. The agencies announced a robust public engagement effort on July 30, 2021, beginning with public meetings in August and extending into the fall and winter with regionally focused and inclusive roundtable discussions.

6. There are significant geographic variations across the United States and a single set of standards will not fit all, how do the Agencies plan to address these differences in any new rule? Should there be a role here for state and local governments and water districts in identifying regional differences and fashioning a workable solution? What are the Agencies going to do to work with states and localities to address these concerns?

**RESPONSE:** See above response to your Question 4. The agencies also have initiated Federalism and Tribal consultations consistent with Executive Orders and Agency guidance. The agencies additionally intend to host a series of dialogues with state and Tribal co-regulators this fall. This is consistent with the robust public engagement effort announced on July 30, 2021, beginning with public meetings in August and extending into the fall and winter with regionally focused and inclusive roundtable discussions. The agencies are interested in hearing from all stakeholders on various aspects of the definition, including communities, states, Tribes, local governments, association groups, small businesses, farmers, and families.

7. Many States and local governments and their representative organizations are concerned that the Agencies' consultation process with state and local governments will once again be flawed, because the Agencies will not sufficiently consult with them, and that the rulemaking could impinge on state authority in water management. Do you consider the states and local government a partner in our Nation's intergovernmental system? Or just another stakeholder group in this discussion? Will the Agencies engage the states and local government in substantive consultation, considering and specifically addressing the concerns raised by the states and local governments, to ensure their concerns are fully addressed in a final rule?

**RESPONSE:** The agencies consider states and local governments key regulatory partners. See above response to your Question 4. The agencies have initiated Federalism and Tribal consultations consistent with Executive Orders and Agency guidance. The agencies additionally intend to host a series of dialogues with state and Tribal co-regulators this fall. This is consistent with the robust public engagement effort announced on July 30, 2021, beginning with public meetings in August and extending into the fall and winter with regionally focused and inclusive roundtable discussions. We are interested in hearing from all stakeholders, including communities, states, Tribes, local governments, association groups, small businesses, farmers, and families. I agree with you that states play a critical role in Clean Water Act implementation, and the agencies look forward to hearing specifically from our state and tribal co-regulators—as well as local governments—to help inform next steps.

8. Will you commit to having the Agencies prepare a detailed response to public comments which will substantively respond to all issues raised in each comment before proceeding to finalize this rulemaking?

**RESPONSE:** Yes, the agencies are soliciting written recommendations from the public through a public docket. This feedback will be used to inform the rulemaking process. The agencies also will carefully review all public comments on the forthcoming proposed rules and respond as appropriate.

9. We are concerned that a new rule would end up having direct, significant effects on small entities, and that the Agencies will fail to convene a Small Business Advocacy Review panel before proceeding with this new rulemaking. Will you commit to formally examining the impacts of any new proposed rule on small entities? Will you convene a Small Business Advocacy Review panel before proceeding any further with this rulemaking?

**RESPONSE:** As the agencies receive and consider feedback from the public—including small businesses—and develop a proposed rule, we will follow the science and the law, including the Regulatory Flexibility Act.

10. Please provide details and definitions for what the Agencies consider “significant environmental damage” and “ongoing environmental harm”, as cited in the announcement for the decision to repeal the current NWPR.

**RESPONSE:** The 2020 NWPR was identified in President Biden’s Executive Order 13990, *Protecting Public Health and the Environment and Restoring Science to Tackle Climate Change*, dated January 25, 2021, which directed federal agencies to review all existing regulations, orders, guidance documents, policies, and any other similar agency actions promulgated, issued, or adopted between January 20, 2017 and January 20, 2021. As a part of the Executive Order 13990 review, the agencies reviewed available data to assess the potential effects of the NWPR, informed by nearly a full year of implementation. The agencies determined that the NWPR is reducing Clean Water Act protections and this lack of protections is particularly significant in arid states like New Mexico and Arizona, where nearly every one of over 1,500 streams assessed through approved jurisdictional determinations has been found to be non-jurisdictional under the NWPR. The agencies also are aware of at least 333 projects that would have required Clean Water Act section 404 permitting prior to the NWPR but no longer do.

11. The Agencies have been inconsistent when describing their plans for the NWPR. In several federal court filings, the Agencies announced that they have “decided to commence a new rulemaking to revise or replace the rule.”<sup>4</sup> Yet in statements to the press, you have stated that the Agencies “are moving quickly” to a two-step rulemaking process under which, the

---

<sup>4</sup> Defendants Motion for Remand Without Vacatur, *Conservation Law Foundation v. EPA*, (D. Mass) Case No. 20-cv-10820-DPW, available at [https://www.epa.gov/sites/default/files/2021-06/documents/clf\\_memo\\_of\\_law\\_iso\\_motion\\_for\\_remand.pdf](https://www.epa.gov/sites/default/files/2021-06/documents/clf_memo_of_law_iso_motion_for_remand.pdf).

first step is to repeal the NWPR.<sup>5</sup> You have stated the Agencies feel “it is important to get the Navigable Waters Protection Rule off the books.”<sup>6</sup> Have the Agencies pre-determined they are repealing the NWPR and that it is not acceptable to instead revise the NWPR?

**RESPONSE:** The agencies intend to revise the definition of “waters of the United States” to create a durable definition following a process that includes two rulemakings. A forthcoming rule would propose to restore the regulations defining WOTUS that were in place for decades until 2015, with updates to be consistent with relevant Supreme Court decisions. A separate, second rulemaking process would be based on a broader review of the rule.

12. The Agencies have stated that the NWPR “resulted in a 25-percentage point reduction in determinations of waters that would otherwise be afforded protection.”<sup>7</sup>
- What is the methodology the agencies used to arrive at this 25% figure?
  - What data or database did the agencies use as the baseline for comparison to the NWPR?
  - What is the geographic distribution of this reduction in jurisdiction (nationwide or isolated to certain regions)?

**RESPONSE:** EPA and the Army have reviewed approved jurisdictional determinations (AJDs) and identified indicators of a substantial reduction in waters covered under the NWPR compared to previous rules and practices. These indicators include an increase in determinations by the Corps that waters are non-jurisdictional and an increase in projects for which CWA section 404 permits are no longer required. The agencies also have found that preliminary jurisdictional determinations (through which applicants proceed with permitting as though all resources were jurisdictional) are much less common under the NWPR, indicating that fewer project proponents believe waters are jurisdictional from the start.

The 25 percent figure comes from looking at AJDs completed nationwide by the Army Corps of Engineers and recorded in their internal database. The Corps finalized 6,351 AJDs between the NWPR’s effective date of June 22, 2020 and April 15, 2021. When this dataset was adjusted to account for differences in how determination forms were designed under the different regulatory regimes, the Corps found approximately 71 percent of AJDs identified non-jurisdictional aquatic resources and 29 percent identified jurisdictional aquatic resources.<sup>8</sup> In comparison, AJDs made under the 2015 Clean Water Rule and the pre-2015 regulatory regime from the time periods of June 22, 2018 to April 15, 2019, and June 22, 2019 to April 15, 2020, found that approximately 46 percent of AJDs included non-jurisdictional

---

<sup>5</sup> Northey, *supra* note 2.

<sup>6</sup> *Id.*

<sup>7</sup> EPA, *Army Announce Intent to Revise Definition of WOTUS* (June 9, 2021), <https://www.epa.gov/newsreleases/epa-army-announce-intent-revise-definition-wotus>.

<sup>8</sup> Under the NWPR, a single AJD in the Corps’ database can include both affirmative and negative jurisdictional determinations. Under prior regulatory regimes, the Corps’ database was structured such that a single AJD could have only affirmative, or only negative, jurisdictional determinations. Because of this difference, a NWPR jurisdictional determination that includes both affirmative and negative jurisdictional resources was normalized and counted as two separate approved jurisdictional determinations, one affirmative and one negative.



aquatic resources and 54 percent included jurisdictional aquatic resources.<sup>9</sup> Thus, there is an absolute 25-percentage point reduction in determinations of waters that would otherwise be afforded protection under the different regulatory regimes.

The agencies also looked at the data from the NWPR on an aquatic resource level. Of the 40,211 individual aquatic resources or water features for which the Corps made approved jurisdictional determinations under the NWPR between June 22, 2020 and April 15, 2021, approximately 76 percent were found to be non-jurisdictional. Many of the non-jurisdictional waters are excluded ephemeral resources (mostly streams) and wetlands that are not adjacent under the NWPR.

The agencies are aware of at least 333 projects that would have required section 404 permitting prior to the NWPR, but no longer do under the NWPR. The agencies also are aware that this number is not the full universe of projects that no longer require section 404 permitting under the NWPR, partly because to the extent that project proponents are not seeking any determinations for waters that the NWPR now excludes, such as ephemeral streams, the effects of such projects are not tracked in the Corps database. As a whole, the reduction in jurisdiction is notably greater than the deregulatory effects discussed in the NWPR rule preamble and the economic analysis case studies.

13. The Agencies have expressed in litigation filings that they have “substantial concerns about the lawfulness of aspects of the NWPR.”<sup>10</sup> More recently, you were quoted as saying the NWPR “is not, in [your] view, something that’s sustainable or durable” and that “[w]e need a rule that’s legally defensible.”<sup>11</sup> How does your view align with the fact that no court has preliminarily enjoined the NWPR? Please describe in detail what you believe is not “legally defensible” about the NWPR.<sup>12</sup>

**RESPONSE:** The Environmental Protection Agency and U.S. Army Corps of Engineers (the agencies) are in receipt of the U.S. District Court for the District of Arizona’s August 30, 2021 order vacating and remanding the NWPR in the case of *Pascua Yaqui Tribe v. U.S. Environmental Protection Agency*. In light of this order, the agencies have halted implementation of the NWPR and are interpreting “waters of the United States” consistent with the pre-2015 regulatory regime until

---

<sup>9</sup> Due to preliminary injunctions, the 2015 Clean Water Rule and the pre-2015 regulatory regime were being implemented in different parts of the country during a portion of the time periods for which the agencies assessed data. Data used in this analysis for the 2015 Clean Water Rule are from August 16, 2018 (the date that the nationwide stay was lifted) to April 15, 2019, and June 22, 2019 to December 22, 2019 (the Clean Water Rule was replaced by the 2019 Repeal Rule on December 23, 2019). The 2015 Clean Water Rule was never in effect for the entire country due to preliminary injunctions. For the time periods assessed under this analysis, the pre-2015 regulatory regime was in effect nationwide from June 22, 2018 to August 15, 2018, and December 23, 2019 (effective date of the 2019 Repeal Rule) to April 15, 2020. The 2019 Rule Repeal, which reinstated the pre-2015 regulatory regime, was in effect until the NWPR’s effective date of June 22, 2020, but the agencies chose to analysis data for comparable time periods as the data available for NWPR determinations.

<sup>10</sup> Declaration of Jaime A. Pinkham, *Conservation Law Foundation v. EPA*, (D. Mass) Case No. 20-cv-10820-DPW, available at [https://www.epa.gov/sites/production/files/2021-06/documents/2\\_conservation\\_law\\_found.\\_d.\\_mass.\\_-jaime\\_pinkham\\_declaration\\_final\\_signed\\_508c.pdf](https://www.epa.gov/sites/production/files/2021-06/documents/2_conservation_law_found._d._mass._-jaime_pinkham_declaration_final_signed_508c.pdf).

<sup>11</sup> Northey, *supra* note 1.

<sup>12</sup> Northey, *supra* note 1.

further notice. The agencies continue to review the order and consider next steps. This includes working expeditiously to move forward with the rulemakings [announced on June 9, 2021](#), in order to better protect our nation's vital water resources that support public health, environmental protection, agricultural activity, and economic growth. The agencies remain committed to crafting a durable definition of "waters of the United States" that is informed by diverse perspectives and based on an inclusive foundation.

14. The Agencies have represented to a federal court that they "have noted on-the-ground effects of the NWPR since the rule went into effect," citing vague and speculative "concerns" raised by stakeholders that the NWPR "is resulting in significant, actual environmental harms."<sup>13</sup> How do those assertions about ongoing harms align with your more recent statements to the press that the Agencies do not have the "ability to really assess the potential water quality impacts on wetlands, on streams, on a range of things"<sup>14</sup> that allegedly result from activities that can move forward without a permit under the NWPR?

**RESPONSE:** The agencies' EO 13990 review identified substantial concerns with the NWPR and the agencies determined that additional consideration should be given to certain aspects of the NWPR through notice-and-comment rulemaking, including concern that when interpreting the jurisdictional scope of the CWA the NWPR did not appropriately consider the effect of the revised definition of "waters of the United States" on the integrity of the nation's waters, as well as concern over the loss of waters protected by the CWA.

15. The Corps' declaration submitted to federal courts refers to 333 projects "that would have required Section 404 permitting prior to the NWPR, but no longer do under the NWPR."<sup>15</sup> However, the approved jurisdictional determinations (AJDs) for many of those projects suggests that the jurisdictional status of waters in question was unknown because the Corps engineer answered "N/A" in the section of the form asking about "Associated JDs."<sup>16</sup> If there was no prior AJD related to the project, what is the Agencies' basis for claiming that the projects would have required Section 404 permits before the NWPR but no longer do? If there was a prior JD, please provide them.

**RESPONSE:** The agencies are aware of at least 333 projects that would have required section 404 permitting prior to the NWPR, but no longer do under the NWPR. These projects had AJDs carried out for determining that no permit would be required. The reference to associated AJDs refers to separate AJDs carried out on

---

<sup>13</sup> Defendants' Memorandum of Law in Support of Motion for Voluntary Remand without Vacatur, Conservation Law Foundation v. EPA, (D. Mass) Case No. 20-cv-10820-DPW, available at [https://www.eenews.net/assets/2021/06/09/document\\_pm\\_01.pdf](https://www.eenews.net/assets/2021/06/09/document_pm_01.pdf); *Supra* n.2.

<sup>14</sup> Northey, *supra* note 2.

<sup>15</sup> Pinkahm, *supra* note 9.

<sup>16</sup>

*See e.g.*: U.S. Army Corps of Engineers, Regulatory Program, Approved Jurisdictional Determination Form (Interim), Navigable Waters Protection Rule, *available at* <https://www.swt.usace.army.mil/Portals/41/docs/missions/regulatory/JD/SWT-2016-344%20AJD.pdf?ver=2020-09-03-084218-473>



the given project site in association with other actions. Notes on associated AJDs allows for Corps staff to track prior activities on sites.

The agencies also are aware that this number is not the full universe of projects that no longer require section 404 permitting under the NWPR, partly because to the extent that project proponents are not seeking any determinations for waters that the NWPR now excludes, such as ephemeral streams, the effects of such projects are not tracked in the Corps database. The reduction in jurisdiction is notably greater than the deregulatory effects discussed in the NWPR rule preamble and the economic analysis case studies.

16. You recently stated that more than 300 projects “now have the ability to move forward without a permit.”<sup>17</sup> You went on to say that “[w]ithout the ability to really assess the potential water quality impacts on wetlands, on streams, on a range of things, that is concerning to us.”<sup>18</sup>
- Does this mean the Agencies have not confirmed that any of those 300 or more projects have moved forward?
  - Even if any given project has moved forward, it appears potential impacts on water quality are unclear. Have the Agencies assessed whether there were any discharges, whether any states imposed regulatory requirements, or whether there were any impacts on water quality?
  - If the Agencies have assessed any of these things, when will you release those findings?

**RESPONSE:** The agencies are aware of at least 333 projects that would have required section 404 permitting prior to the NWPR, but no longer do under the NWPR. The agencies also are aware that this number is not the full universe of projects that no longer require section 404 permitting under the NWPR, partly because to the extent that project proponents are not seeking any determinations for waters that the NWPR now excludes, such as ephemeral streams, the effects of such projects are not tracked in the Corps database. The reduction in jurisdiction is notably greater than the deregulatory effects discussed in the NWPR rule preamble and the economic analysis case studies. Based on this and other aspects of the EO 13990 review, EPA and the Army have substantial concerns about aspects of the NWPR and the harmful effects of the NWPR on the nation’s waters. Therefore, we have decided to initiate rulemaking to revise the term “waters of the United States.”

17. The Agencies have asserted in sworn declarations that “[p]rojects are proceeding in newly non-jurisdictional waters in states and tribal lands where regulation of waters beyond those covered by the CWA are not authorized.”<sup>19</sup>
- What basis supports this claim?
  - Which projects are proceeding and in which states? Have the Agencies confirmed that each of these states, in fact, do not have laws in place that address discharges to ephemeral streams or wetlands that are not jurisdictional under the NWPR?

---

<sup>17</sup> Northey, *supra* note 2.

<sup>18</sup> *Id.*

<sup>19</sup> Pinkham, *supra* note 9.

- c. Have the Agencies confirmed that any of these unnamed projects in fact involve discharges to newly non-jurisdictional waters?

**RESPONSE:** The agencies have heard concerns from a broad array of stakeholders, including states, Tribes, scientists, and non-governmental organizations, that the reduction in the jurisdictional scope of the CWA is resulting in significant, actual environmental harms. These entities have identified specific projects and discharges that would no longer be subject to CWA protections because the waters at issue would no longer be jurisdictional. In many cases permit applications have been withdrawn. For example, stakeholders have raised concerns about dredge and fill activities on large swaths of wetlands in sensitive areas, in the floodplains of jurisdictional waters, or even within several hundred yards of traditional navigable waters, that are proceeding without CWA regulatory protection or compensatory mitigation. Stakeholders also have identified for the agencies many other wetlands and streams, newly deemed non-jurisdictional, which are likely to be filled for commercial and housing developments, mines, water pipelines, and other forms of development without CWA oversight.

Due to the NWPR definition of “waters of the United States,” projects are proceeding in newly non-jurisdictional waters in states and tribal lands where regulation of waters beyond those covered by the CWA are not authorized, and based on available information, will therefore result in discharges without any regulation or mitigation from federal, state, or tribal agencies. *See* “Economic Analysis for the Navigable Waters Protection Rule: Definition of “Waters of the United States” at 40 (Jan. 22, 2020) (indicating that a large number of states do not currently regulate waters more broadly than the CWA requires, and are “unlikely to increase state regulatory practices” following the NWPR).<sup>20</sup> One project example is the construction of a mine that would destroy hundreds of previously jurisdictional wetlands, deemed non-jurisdictional under the NWPR, next to a National Wildlife Refuge.

18. The Agencies found that in New Mexico and Arizona, nearly all of the more than 1,500 streams have been deemed a non-jurisdictional ephemeral resource, “which is very different from the status of the streams as assessed under both the Clean Water Rule and the pre-2015 regulatory regime.”<sup>21</sup> Under the pre-2015 regime, however, ephemeral resources were not *per se* jurisdictional, but instead had to undergo case-by-case determinations to see if there was a “significant nexus.” What data do the Agencies have to show that any of these streams would have been jurisdictional under a case-by-case determination for “significant nexus”?

**RESPONSE:** Ephemeral streams, wetlands, and other aquatic resources provide numerous ecosystem services, and there could be cascading and cumulative downstream effects from impacts to these resources, including but not limited to effects on water supplies, water quality, flooding, drought, erosion, and habitat integrity. The agencies have substantial concerns about the consideration of these

---

<sup>20</sup> Available at [https://www.epa.gov/sites/default/files/2020-01/documents/econ\\_analysis\\_-\\_nwpr.pdf](https://www.epa.gov/sites/default/files/2020-01/documents/econ_analysis_-_nwpr.pdf).

<sup>21</sup> *Id.*

effects on the chemical, physical, and biological integrity of the nation's waters in the NWPR rulemaking process.

19. If there is a hurricane and it floods a section of farmland in my district, North Carolina's 7<sup>th</sup> Congressional district, which then drains into the Cape Fear River and then the Atlantic Ocean, would that constitute a "Water of the United States"?

**RESPONSE:** Uncertainty over the definition of "waters of the United States" has harmed our waters and the stakeholders and communities that rely on them. EPA and the Army look forward to engaging all parties as we move forward to provide the certainty that's needed to protect our precious natural water resources. We are committed to crafting an enduring definition of "waters of the United States" by listening to all sides so we can build on an inclusive foundation. Our goal is to develop a WOTUS definition that ensures clean and safe water for all while giving you and your district the certainty you need to appropriately address emergency situations like the scenario referenced in your question.

20. In making the decision to replace the NWPR, what public input did the Agencies rely on to drive this action? What groups, associations, entities, or other stakeholders requested the Administration take this action?

**RESPONSE:** Based on a careful evaluation of the record of the NWPR, the agencies have substantial and legitimate concerns regarding the adequacy of consideration of the CWA's water quality goals in the development of the NWPR. As such, the agencies believe it is appropriate to reconsider these issues—and, in particular, the effects of the "waters of the United States" definition on the chemical, physical, and biological integrity of the nation's waters—in a new rulemaking. We have initiated a robust and meaningful public engagement effort to hear from all of those impacted by the WOTUS definition, including Tribes, states, local governments, communities, and any other interested stakeholders.

As explained above, the agencies announced a robust public engagement effort on July 30, beginning with public meetings and a recommendations docket in August and extending into the fall and winter with regionally focused and inclusive roundtable discussions. We are interested in hearing from all stakeholders, including communities, states, Tribes, local governments, association groups, small businesses, farmers, and families.

Questions from Congressman Salud Carbajal (CA):

1. Can you explain the importance of the administration's request of \$9 million for the Drinking Water System Infrastructure Resilience and Sustainability Program?

**RESPONSE:** This program supports water infrastructure in underserved, small and disadvantaged communities, ensuring access to safe drinking water. It supports the President's priority of assisting communities and their drinking water systems in the planning, design, construction, implementation, operation, or maintenance of a program or project that increases resilience to natural hazards. Eligible entities will

be able to use this increase in funding will target climate resilience for drinking water infrastructure to adapt to or withstand the effects of a malevolent act or natural hazard.

2. Can you provide an update on this program's implementation?

**RESPONSE:** EPA appreciates Congress' recent attention toward upgrading and modernizing our nation's drinking water systems. Congress authorized the Drinking Water System Infrastructure Resilience and Sustainability Program in America's Water Infrastructure Act of 2018, and Congress provided first-time appropriations for this program in Fiscal Year 2020. EPA is in the final stages of preparing a Request for Applications (RFA) for this inaugural round of funding.

3. As currently structured, the program is only available to assist drinking water systems serving small and disadvantaged communities. Are these the only water systems that face challenges related to climate change and extreme weather, or would wastewater systems and larger drinking water systems also benefit if Congress expanded the program to make them eligible as well?

**RESPONSE:** As you know, there are certainly important differences between the needs of our country's drinking water systems and our wastewater and stormwater systems. EPA supports several programs that ensure access to clean and safe water for all Americans including underserved, small and disadvantaged communities.

Questions from Congressman Greg Stanton (AZ):

1. Tribal water systems are facing many of the same challenges as our smaller systems in finding qualified workers, but in many instances, they are often doing so far with fewer resources.
  - a. How is EPA approaching the next generation of tribal operators?
  - b. How can EPA help with future planning for tribal water systems in developing a new workforce?

**RESPONSE:** EPA's technical assistance and training programs help to ensure that all communities, especially small and underserved communities, have the tools they need to address their pressing water infrastructure and other water quality needs. In addition, EPA provides training and technical assistance and certification for tribal wastewater and drinking water systems to improve their operation and management practices and promote sustainability. Examples of EPA technical assistance and training programs that help tribal communities include the Tribal Public Water System Supervision, the Drinking Water Infrastructure Grants Tribal Set-Aside, WIIN Act Section 2104: Assistance for Small and Disadvantaged Communities Tribal Grant, the Clean Water Indian Set-Aside, Small System Technical Assistance for Drinking Water and Wastewater Grant, and the new Technical Assistance for Small Wastewater Systems Grant programs.

EPA appreciates this Committee's attention to water infrastructure and to our water workforce—including our Tribal water workforce—and I look forward to being a partner with Congress as you consider this important issue